

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

FILED
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BENJAMIN ANDERSON,
Petitioner,

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Docket No.: 2012779

v.

2012779-OSAH-DCH-HFR-PHCP-38-
Schroer

GEORGIA DEPARTMENT OF
COMMUNITY HEALTH, HEALTHCARE
FACILITY REGULATION DIVISION,
Respondent.


Kevin Westray, Legal Assistant

FINAL DECISION

Petitioner Benjamin Anderson, the owner of Super Nurses Home Care, Inc. (“Super Nurses”), appeals the decision of Respondent Georgia Department of Community Health, Healthcare Facility Regulation Division (“DCH”), to revoke his license to provide private home care services. The hearing was conducted on December 18, 2019, by the undersigned Administrative Law Judge from the Office of State Administrative Hearings (“OSAH”). Petitioner was represented by Daniel Hoffey, Esq., and DCH was represented by Shariyf Muhammad, Esq.

For the reasons stated below, DCH’s decision is **REVERSED and REMANDED**.

FINDINGS OF FACT

1.

Petitioner owns and operates Super Nurses, which provides private home care (“PHC”) services to patients in their own residences. PHC services typically include nursing services, personal care tasks, and companion or sitter tasks. Ga. Comp. R. & Regs. 111-8-65-.03(q) & (r). Under Georgia law, all PHC providers must obtain a license to operate from DCH. Ga. Comp. R. & Regs. 111-8-65-.05. Petitioner applied for a license to operate Super Nurses in May 2018, listing the business address as 241 Charlie Fuller Road, Grantville, Georgia 30220. (Testimony of Sonya Arnold Williams; Exhibits R-5, R-7.)

2.

DCH periodically inspects PCH providers to determine their compliance with DCH rules. Ga. Comp. R. & Regs. 111-8-65-.08. Typically, DCH inspectors make unannounced visits to the business office of the provider, where they review patient service plans, initial nursing assessments, and other documents. As part of the PCH license application, the applicant and the owner of the business agree to allow DCH to enter the premises for the purpose of conducting an inspection during regular business hours:

Department representatives shall be allowed reasonable and meaningful access to the provider's premises, all records relevant to licensure and all provider staff. Providers shall assist and cooperate in arranging for department representatives to have meaningful access to provider's clients who consent to be interviewed by department representatives in connection with any licensure activity.

Ga. Comp. R. & Regs. 111-8-65-.08(2)(a).

3.

According to Sonya Arnold-Williams, a compliance specialist with DCH, she usually begins her unannounced inspections by driving to the business address for the provider and knocking on the door. If no one answers, she waits for a little while and then calls the contact telephone number listed in the provider's profile. Ms. Arnold-Williams testified that DCH does not require that the administrator or owner be present for the inspection. Any employee of the provider can give the inspector access to the premises and the records. (Testimony of Ms. Arnold-Williams.)

4.

On February 12, 2019, Ms. Arnold-Williams went to 241 Charlie Fuller Road in Grantville to conduct an annual inspection of Super Nurses. She arrived at 10:20 a.m. and knocked on the door. She also tried to call the telephone number listed for the provider, but no one answered and there was no voicemail set up for her to leave a message. She waited for a while, and someone

who identified themselves as an employee of Super Nurses told her that the owner was unavailable.¹ Ms. Arnold-Williams contacted her supervisor, who advised that she would try to reach Mr. Anderson by telephone. However, when they did not hear from him within an hour, Ms. Arnold-Williams was told to abort the inspection. Although she usually leaves her telephone number on the door when no one is present for an inspection, she did not do so in this case. (Testimony of Ms. Arnold-Williams; Exhibit R-2.)

5.

DCH then issued a Notice of Deficiency to Super Nurses, documenting the unsuccessful inspection attempt on February 12, 2019. Although the form includes a blank space for the provider to respond to the Notice of Deficiency with a Plan of Correction, it is unclear from the record whether DCH instructed Mr. Anderson to do so in this case.² DCH did not receive a plan of correction from Super Nurses, and Ms. Arnold-Williams tried to conduct the inspection again on May 7, 2019. She arrived at 241 Charlie Fuller Road at approximately 10:45 a.m. Although there were cars in the driveway, no one answered the door when Ms. Arnold-Williams knocked. She tried to call the number for Mr. Anderson but could not reach him. After about thirty minutes, Ms. Arnold-Williams drove her car around the corner. She watched to see if anyone came in or out of the premises, but when she did not see anyone or hear back from Mr. Anderson, she left and went to conduct another inspection. There is no evidence that she left a written notice of her attempted visit at the premises, although she did leave a voice mail message at the provider's telephone number, explaining the nature of her visit and leaving her call-back telephone number.

¹ Ms. Arnold-Williams usually documents the names of individuals she interviews during her inspections, but she did not note the name of this individual.

² Michelle Robinson, a former surveyor of PHC providers, is familiar with DCH's records relating to the Super Nurses' inspection. However, although she testified that she has seen a cover letter for the Notice of Deficiency, she does not know the date of the letter or when or if it was mailed to Mr. Anderson with the Notice of Deficiency. The cover letter was not offered into evidence at the administrative hearing.

(Testimony of Ms. Arnold-Williams, Michelle Robinson; Ex. R-3.)

6.

DCH issued another Notice of Deficiency due to the missed May 7, 2019 inspection. Like the February 2019 Notice of Deficiency, it is unclear from the evidence in the record when the Notice of Deficiency was mailed and whether a cover letter accompanied the Notice. On July 30, 2019, DCH sent a Notice of Intent to Revoke Permit to Petitioner by both certified and regular mail to the 241 Charlie Fuller Road address. The Notice to Revoke Permit attached both the February 12, 2019 and the May 7, 2019 Notices of Deficiency. (Testimony of Ms. Arnold-Williams, Ms. Robinson; Exhibit R-1.)

7.

Around this time, on or about April 30, 2019, the annual license issued to Super Nurses was set to expire, and Petitioner was required to pay a \$200.00 renewal fee. From the records provided by DCH, it appears that despite past renewal due dates in April, Super Nurses' annual fee was not processed until August in both 2017 and 2018. There is no evidence that DCH ever assessed a late fee or other penalty for a late payment in the past. However, in 2019, on or about September 6, 2019, DCH mailed a letter to Petitioner advising him that because his renewal fees and application had not been received, his license had expired, and Super Nurses was considered to be voluntarily closed. (Testimony of Jamia Everson; Exhibits R-4, R-6.)

8.

At the administrative hearing, Mr. Anderson testified that he has been the administrator of Super Nurses for the past four years, and he also ran its predecessor for six years. According to Petitioner, DCH conducted an inspection of Super Nurses in late November 2018, at the business' former premises, which were located across the street at 202 Charlie Fuller Road. In fact, Mr. Anderson met with DCH inspectors at 202 Charlie Fuller Road on or about November 28, 2018.

However, due to a flooding and mold problem at 202 Charlie Fuller Road property, Petitioner moved the business offices and records to the current location across the street at 241 Charlie Fuller Road right around this time of the November 28, 2018 meeting with DCH. (Testimony of Mr. Anderson.)

9.

By February 2019, the office had been fully transitioned to the 241 Charlie Fuller Road location, and the 202 Charlie Fuller Road location became Super Nurses' training center. The business had a landline set up to receive calls for Super Nurses at 241 Charlie Fuller Road by January 2019, and Mr. Anderson was usually in the office during business hours, along with an office manager and a nurse. According to Mr. Anderson, he did not see anyone from DCH on February 12, 2019, and did not receive any voice mail messages, any messages from his staff, or any written notification that an inspector had been there on that day until he received the Notice of Insufficiency. He testified that he called DCH and was told that DCH would just send someone back out for a surprise inspection. However, he was unaware of Ms. Arnold-Williams's follow-up visit on May 7, 2019, and he denied receiving her voice mail message regarding the inspection. He did acknowledge receiving the May 7, 2019 Notice of Deficiency, and there is no evidence in the record that he attempted to respond to this notice, either in writing or by telephone. (Testimony of Petitioner.)

10.

Finally, Mr. Anderson testified that he has had many problems with paying his annual license fee in the past, particularly with DCH's delay in processing his payments. In the past, he would drive the payment to DCH's offices in Atlanta around the time of expiration in April, but the payment would not be processed until months later, in or around August. In 2019, Petitioner testified that he wrote a check for \$400.00 on or about April 10, 2019 and sent it to DCH's post

office box in Atlanta. When he did not get his new license in the mail, he went to Atlanta to DCH's office, on or about June 28, 2019, and asked about his payment and license. DCH did not have a record of receiving the check, and it had not cleared Super Nurses' bank account. However, when Mr. Anderson offered to write a new check on June 28, he was instructed to wait and let DCH staff look for the check first. (Testimony of Mr. Anderson; Exhibit P-3.)

11.

After receiving the Notice of Intent to Revoke Permit from DCH, Petitioner requested a hearing on August 10, 2019. Petitioner testified that he did not try to evade the inspectors in February and May 2019, and he made a good faith effort to pay his renewal fee on time. (Testimony of Petitioner.)

CONCLUSIONS OF LAW

1.

DCH bears the burden of proof in this matter. Ga. Comp. R. & Regs. 616-1-2-.07. However, both parties bear the burden of proof as to any fact, asserted by them, if the proof of the fact is essential to their case or defense. O.C.G.A. § 24-4-1; OSAH Rule 616-1-2-.07(1)(d). The standard of proof is a preponderance of evidence. Ga. Comp. R. & Regs. r. 616-1-2-.21.

2.

Under Georgia law, DCH may take disciplinary actions against PHC providers who fail to comply with licensing requirements, including a licensee's failure or refusal to provide the department with access to their premises for purposes of conducting an inspection. See O.C.G.A. § 31-2-8(b)(2); Ga. Comp. R. & Regs. 111-8-65-.13. Among other disciplinary actions, DCH may administer a public reprimand, suspend or revoke a license, impose a fine, or limit or restrict the license. Id., at 8(c). With respect to inspections, in particular, DCH has adopted a rule requiring that "[a]ll provider staff shall cooperate with any inspection conducted by the department, and

shall provide, without unreasonable delay, any documents to which the department is entitled hereunder.” Ga. Comp. R. & Regs. 111-8-65-.08(3). In addition, as set forth above, DCH representatives must be allowed “reasonable and meaningful access to the provider’s premises.” Id., at (2)(a).

3.

Although DCH has adopted a number of regulations that relate to the maintenance and retention of client records and the qualification and training of personnel who work directly with patients, the regulations do not specify that the records must be kept in a location that is immediately accessible during business hours upon request of DCH or that a PHC provider must have staff present or available at the office location at all times during the work day. See Ga. Comp. R. & Regs. 111-8-65-.09; -.12(5).³ By definition, PHC providers perform their essential services in the private residences of their patients; it is only the administrative and recording keeping functions of the business that are performed in the office, and DCH did not point to any legal requirement that a PHC provider must keep the office staffed at all times. Thus, the mere fact that a Super Nurses staff member was not physically present at the business premises at the time of DCH’s unannounced inspection is not itself a violation of any of DCH’s licensing regulations.

4.

Rather, licensees are only required to provide “reasonable and meaningful access” to the premises and to cooperate with the inspection of their records “without unreasonable delay.” Ga. Comp. R. & Regs. 111-8-65-.08(2) & (3). Certainly, it is a good business practice to have the office premises and telephone monitored during business hours and for the administrator to

³ DCH’s regulations require a provider to supply its clients “with a specific telephone number of the provider for information, questions or complaints about services being delivered by the provider” and requires the provider to respond to complaints “in a timely manner.” Ga. Comp. R. & Regs. 111-8-65-.12.

promptly respond to inquiries or requests for access from DCH. Moreover, a provider's failure to respond to a request to inspect within a reasonable time period would violate the rules. However, with respect to DCH's attempted inspection in February 2019, the Court concludes that Super Nurses' response to DCH was not unreasonable. Ms. Arnold-Williams did not leave a written notice of her attempted visit at the premises, and she was unable to identify the individual with whom she spoke outside the premises on the date of her February visit. Moreover, without evidence that Petitioner was instructed to file a written response to the Notice of Deficiency, the Court concludes that his telephone call to DCH seeking guidance on how to respond to the February 2019 Notice of Deficiency was reasonable.

5.

However, with respect to the second Notice of Deficiency relating to the May 7, 2019 attempted inspection, the Court concludes that Mr. Anderson's response was inadequate. That is, after missing a second unannounced inspection visit, it was not reasonable for Petitioner to do nothing. At a minimum, upon receiving notice that DCH had been unable to complete its inspection of Super Nurses' premises, Petitioner was obligated to either call or write DCH to arrange for prompt access to his records. Accordingly, the Court concludes that Petitioner violated DCH rules requiring Super Nurses to cooperate with the May 2019 inspection without unreasonable delay, and Petitioner's license is subject to sanction.

6.

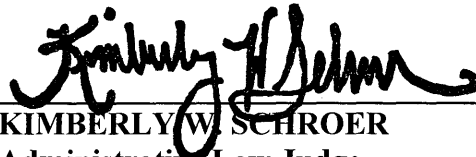
In weighing the appropriateness of DCH's proposed sanction of revocation, the Court has considered that DCH proved only one violation of the inspection requirements, not two, as well as the absence of any specific rules requiring Super Nurses to staff its office location at all times or mandating a particular time period during which providers must respond to inspection requests. The Court concludes that the sanction of revocation is too harsh under these circumstances.

Rather, the appropriate sanction would be a suspension of the license until Petitioner fully complies with its obligation to allow meaningful access to its records and premises, as well as payment in full of any outstanding licensing fees and penalties.

DECISION

For the foregoing reasons, DCH's decision to revoke Petitioner's license to provide private home care services is hereby **REVERSED**. The case is **REMANDED** to the agency to issue a notice of license suspension, specifying the conditions for reinstatement of the license, including the amount of any outstanding fees and penalties owed and the requirements for the prompt inspection of Petitioner's premises.

SO ORDERED this 12th day of February, 2020.



KIMBERLY W. SCHROER
Administrative Law Judge